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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 1 4 1994

94-123

In the Matter of	)	
	)	
Application for Review	)	MM File No. 870622A
of 47 C.F.R. § 73.658(k),	)	MM File No. 900418A
the Prime-Time Access Rule	)	MM File No. 920117A

To: The Commission

COMMENTS OF THE COALITION TO ENHANCE DIVERSITY

June 14, 1994

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SUMMARY

For more than twenty years, PTAR's "off-network" restriction has prevented affiliates of ABC, CBS, and NBC in the top fifty markets from airing, during the first hour of prime time, shows formerly carried on a network. As a result, these stations are essentially forced to air first-run syndicated programming such as "Jeopardy" and "Wheel of Fortune" from 7 to 8 p.m. For the reasons summarized below, the Coalition to Enhance Diversity respectfully submits that the time has come to eliminate this restriction on off-network programming:

1. ***The restriction is an anachronism in the modern video marketplace***. The off-network prohibition was originally enacted in 1970 to promote programming diversity in a television industry generally limited to no more than three stations per market. Today, as a result of the rapid expansion of cable and other advanced video distribution technologies, the median U.S. household receives more than thirty TV channels. In this environment of television abundance, the off-network restriction is no longer needed or warranted.

2. ***The off-network prohibition has not promoted diversity, even on the three regulated channels***. Three media conglomerates — King World, Paramount, and Fox — control *93%* of the first-run syndicated programming that dominates the prime-time "access" time slots on affiliated stations. This concentration of control is the antithesis of the source diversity that the FCC sought to promote when it enacted the restriction twenty-four years ago.

3. ***The prohibition unreasonably forces affiliated stations to subsidize first-run producers***. By precluding these stations from carrying off-network shows in access, the prohibition effectively reduces affiliates to the status of a "captive market" for the three companies that dominate the supply of first-run programs. The artificially inflated prices affiliates are forced to pay for such shows operate as a massive and unwarranted subsidy to these huge companies.

4. ***The restriction unreasonably forces suppliers of off-network shows to subsidize the owners of major-market independent stations***. By removing affiliates from the customer base for these suppliers, the restriction also artificially lowers the price of off-

network shows to independents. If allowed to continue, this subsidy will undermine the quality of programming produced for ABC, CBS, and NBC — because subsequent off-network syndication of these shows is an essential component of their financing. This problem is further exacerbated by a continuing decline in the value of off-network syndication that has been a by-product of the development of the Fox Broadcasting Company's television network. As numerous formerly independent stations have become Fox affiliates, their prime-time schedules have largely come to be unavailable for off-network shows. At the same time, "off-Fox" shows have further contributed to a "glut" in the supply of off-network shows.

5. ***Repeal of the provision would not threaten the viability of independent stations***. The subsidy provided by this protectionist regulation is of benefit only to the larger, better financed stations that are able to purchase the "hit" off-network shows that (in the absence of the rule) might be purchased by affiliates. These powerful "independent" stations are generally controlled by large group owners or are affiliated with the Fox network. They neither need nor deserve a government-mandated subsidy.

6. ***Repeal would not threaten the viability of first-run syndication***. Popular first-run shows are now firmly established in the marketplace. They regularly outperform off-network programs in ratings competition. The giant companies that dominate this business are not appropriate candidates for a government-directed "welfare" program.

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To: The Commission

COMMENTS OF THE COALITION TO ENHANCE DIVERSITY

The Coalition to Enhance Diversity ("Coalition"),[1] by its attorneys, hereby submits its comments on the above-captioned application and petitions, which address 47 C.F.R. § 73.658(k), the Commission's Prime-Time Access Rule ("PTAR").

I. THE OFF-NETWORK RESTRICTION IS ANACHRONISTIC AND NOW DISSERVES THE PUBLIC INTEREST.

PTAR prevents affiliates of ABC, CBS, and NBC[2] in the top fifty television markets[3] from broadcasting during one hour of prime time each evening programs that initially ran on those networks. This prohibition is known as the "off-network restriction."[4]

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[1] Members of the Coalition are listed in Appendix A.

[2] Fox and its network affiliates are not covered by PTAR. *See infra* at Section I.B.4.

[3] PTAR does not extend to the fifty-first and smaller markets; thus affiliates located in those markets can air whatever they choose during the access period. For ease of reference, the term "affiliates" is used from this point forward to refer only to affiliates of ABC, CBS, and NBC located in the top fifty markets, unless specifically noted to the contrary. The term also includes the stations that ABC, CBS, and NBC own in those markets.

[4] PTAR has another component which prevents affiliates from airing new programming that ABC, CBS, or NBC might otherwise provide as part of their current prime-time schedule. *The Coalition does not propose that the FCC modify this aspect of PTAR.*

The FCC enacted the off-network restriction a quarter of a century ago to break the "centralized control" it found that ABC, CBS, and NBC held over the nation's television viewers.[5] The Commission pointed to data showing the small amount of non-network programming aired by affiliates during prime time and the "virtual disappearance of high cost, prime time, syndicated programming."[6] The agency declared that the "essential purpose" of PTAR was to "open the market to first run syndicated programs" on the networks' affiliated stations.[7] The agency expected that the off-network restriction would help independent producers, who would "have the opportunity to develop their full economic and creative potential under better competitive conditions than are now available to them."[8] Even assuming that the off-network restriction may once have promoted first-run syndication, the restriction today is an anachronism. Its costs also far outweigh its benefits. The FCC concluded in 1970 that, "[s]hould the time come to review the rule again, it may well be that a continuing lack of diversity will be grounds for change."[9] The time for that change has arrived.

A. A Three-Channel Universe No Longer Exists.

In substantially revising the related financial interest and syndication ("fin-syn") rules, the FCC has already recognized that the television landscape has changed dramatically since the early 1970s.[10] In the early 1970s, when both PTAR and fin-syn were enacted, 87% of the commercial stations operating nationwide were affiliated with one of the three existing broadcast networks.[11]

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5 *See Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C. 2d, 382, 385-93 (1970) ("*PTAR I*"), *amended*, 25 F.C.C. 2d 318 (1970), *aff'd*, *Mount Mansfield Television v. FCC*, 442 F.2d 470 (2d Cir. 1970).

6 *Id.* at 385.

7 *Id.* at 395; *see also Prime Time Access Rule*, 50 F.C.C. 2d 829, 836 (1975) ("*PTAR III*"), *aff'd in part and rev'd in part sub nom. National Ass'n of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975).

8 *PTAR I*, 23 F.C.C. 2d at 397.

9 *PTAR III*, 50 F.C.C. 2d at 838.

10 *See generally* Setzer and Levy, *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd 3996 (1991) ("*OPP*").

11 *Amendment of the Syndication and Financial Interest Rules*, 94 F.C.C. 2d 1019, 1057 (1983) ("*Fin-syn Tentative Decision*").

Together, ABC, CBS, and NBC captured more than 90% of the prime-time viewing audience.[12] Among independent stations in the top fifty markets, only fourteen were VHF allocations.[13] Most markets had only three stations, and those markets with more than that number often included UHF stations, which operated under a technological disadvantage that prevented them from reaching the widest possible audiences.[14] No cable networks were then in operation; what little cable service was available functioned as a simple broadcast retransmission medium for communities in remote areas. And home satellite dishes and videocassette recorders ("VCRs") existed only on engineers' drawing boards.

Since that time, the video marketplace has been characterized by rapid change and explosive growth.[15] The number of U.S. commercial television stations has grown from 690 to 1,153.[16] Perhaps an even more significant change has been the establishment of a fourth broadcast network, with the promise of other new networks on the way.[17]

In addition to this radical transformation of the television broadcast landscape, cable systems, satellites, and other new technologies hardly envisioned in the 1970s have become a reality. Cable now passes 91% of U.S. homes, delivering on average more than thirty channels of programming to subscribers.[18] Cable carriage also eliminates the technological disadvantage that once hobbled UHF stations. And more than 100 programming networks have been created for cable systems, substantially augmenting the numerous program choices available through broadcast sources.[19] Of homes not passed by cable, 33% own home satellite dishes to pull in

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[12] *Fin-Syn Tentative Decision*, 94 F.C.C. 2d at 1055.

[13] *PTAR I*, 23 F.C.C. 2d at 385.

[14] *See, e.g., Fin-syn Tentative Decision*, 94 F.C.C. 2d at 1057-58.

[15] *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3283, 3304-08 ("*Fin-syn Second R&O*") *recon.*, 8 FCC Rcd 8270 (1993), *appeal pending, Capital Cities/ABC, Inc. v. FCC*, No. 93-3458 (7th Cir.).

[16] *Fin-syn Tentative Decision*, 94 F.C.C. 2d at 1057; *By the Numbers*, Broadcasting & Cable, May 23, 1994, at 117.

[17] *See infra* at Section I.B.3.b.

[18] The Kagan Media Index, Apr. 28, 1994, at 5; *Fin-syn Second R&O*, 8 FCC Rcd at 3305.

[19] *Fin-syn Second R&O*, 8 FCC Rcd at 3305.

additional programming sources.[20] Moreover, 400,000 television households have turned to "wireless" cable systems,[21] and others are expected to sign on with the emerging direct broadcast satellite ("DBS") systems. VCRs further supplement video viewing options in more than 87% percent of American homes.[22] And still other options should become available via many of these transmission-delivery systems once digital compression techniques become common in the marketplace.[23]

Many of these outlets in the new television universe do not yet attract sufficient viewership to afford network-quality programming. Nonetheless, they have dramatically multiplied the choices now available to viewers. The myriad of new programming alternatives that the public now enjoys constitute the "grounds for change" of the off-network restriction that the agency anticipated in 1970.[24]

B. The Off-Network Restriction Now Creates Negative Consequences.

The off-network restriction artificially subdivides the market for access programming into two submarkets — a first-run market for affiliates and an off-network market for independent stations.[25] Assuming, *arguendo*, that this division helped to jump-start the first-run market, the restriction's usefulness has now run its course. The first-run market is thriving and is in no need of regulatory assistance from the government. The off-network restriction, on the other hand, now creates complications beyond those that might be expected of regulations which are merely

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[20] *See* A Survey of Subscriber Households, Satellite TV Week, June 13, 1993, at 14 (57.8% of backyard dish subscribers are not passed by cable); The Kagan Media Index, Apr. 28, 1994, at 5 (1.6 million television households subscribe to satellite services through backyard dishes; 2.8 million television households are not passed by cable).

[21] The Kagan Media Index, Apr. 28, 1994, at 5.

[22] *Id.*

[23] *OPP*, 6 FCC Rcd at 4001.

[24] *See supra* at note 9 and accompanying text.

[25] *See* Reply Comments of Independent Stations, MM Docket No. 90-162 at 32, Aug. 1, 1990 (independents generally run off-network sitcoms and dramatic series during "independent prime time") ("Independent Stations 1990 Reply"); *Evaluation of the Financial Interest and Syndication Rules*, 8 FCC Rcd 8270, 8294 n.64 (1993).

outdated. In the changed marketplace of the 1990s, the restriction is igniting a chain reaction of unintended and harmful consequences that thwarts vital Commission goals.

1. The Off-Network Restriction Does Not Promote Diversity During Access on the Three Channels It Covers.

In enacting the off-network restriction, the FCC predicted that its regulation would give a boost to first-run syndicated programming by carving out an hour in prime time during which programming "from a network" could not be aired.[26] The agency also fervently "hoped" that the access hour would often be filled with local programming.[27] The Commission's overriding purpose, however, was to increase diversity in the number of programming sources during access beyond just three, with the ultimate end of enhancing viewer choice.[28]

Even if the agency's goal of elevating the quantity of first-run programming has been achieved, it has not succeeded in dramatically increasing viewer choice. While some stations do produce local programs for the access period, the years since 1970 have not witnessed the overall rise in locally produced programming that the Commission sought. Instead, the programming of three companies — King World, Fox, and Paramount — dominates the access period. Nor have the types of programs become more varied. Instead, the vast majority of affiliates carry first-run syndicated shows that typically are less expensive to produce than the network programs they replaced — *e.g.*, game shows ("Wheel of Fortune" and "Jeopardy") and "reality-based" programs ("Hard Copy" and "A Current Affair").

As Figure 1 illustrates, ten first-run programs account for 71% of the 300 affiliate access time periods in the top fifty markets. In fact, 49% of the available time periods are filled with just four shows: "Wheel of Fortune," "Jeopardy," "Inside Edition," and "American Journal." Thus,

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26 *PTAR I*, 23 F.C.C. 2d at 394-95, 397.

27 *See, e.g.*, *PTAR I*, 23 F.C.C. 2d at 397 (licensee "may rely on his own program ingenuity or use locally originated programming to fill out his schedule."); *PTAR III*, 50 F.C.C. 2d at 852 (declaring that stations subject to the rule were expected to devote "an appropriate portion" of access time (or other prime time hours) to "material particularly directed to the needs or problems of a station's community . . . including programming addressed to the special needs of minority groups").

28 *PTAR I*, 23 F.C.C. 2d at 395; *PTAR III*, 50 F.C.C. 2d at 836.

the off-network restriction has not enhanced diversity. Rather, it has merely led to unfair subsidies from affiliates to first-run syndicators.

FIGURE 1

Affiliate Access Programming in Markets 1-50

	# of Half Hours	% of Total	All Program(s)
First-Run Programming	212	71%	Wheel, Jeopardy, E.T., Hard Copy, Current Affair, Inside Edition, American Journal, Love Connection, Family Feud, Highway Patrol
Off-Fox Programming	12	4%	Married w/Children, Cops
Off-Net Sitcoms*	4	1%	Coach, Cheers, Roseanne, Golden Girls
Off-Net (PTAR exemption)	4	1%	Rescue 911
Off-Syndication	2	1%	Star Trek TNG
Local News	48	16%	
Network News	15	5%	
Local Programming	3	1%	
Total	**300**	**100%**	

** Grandfathered in two markets formerly below top fifty.*

Source: Nielsen Stations Index ("NSI"), Nov. 93. All affiliates, M-F 700-800 (E.S.T.).

2. The Effect of the Off-Network Restriction Is To Unjustifiably Subsidize First-Run Syndicated Programming.

By foreclosing affiliates from airing proven off-network shows during access, the restriction severely constrains affiliates' choices. The overwhelming majority of affiliates have turned to a few popular first-run shows with national exposure because the stations are deprived of off-network programming — the alternative with the best track record. The intense competition for these few first-run programs among the three affiliates in each market inflates the price of such programming, while simultaneously undermining the viability of off-network syndication.

There is no justifiable public policy reason for an artificial restriction on affiliates' choices that has the effect of requiring them to pay inflated prices to the three companies that dominate the access period. Together, King World, Fox, and Paramount control 93% of all syndicated programming aired by affiliates in the access period.

FIGURE 2

Distributor Control of Access Programming

	# of Half Hours Top 50 Markets	*% of Total Available*	*All Show(s)*
King World	115	49%	Wheel, Jeopardy, Inside Edition, American Journal
Paramount	66	28%	E.T., Hard Copy, Star Trek TNG
Fox	37	16%	Current Affair, Cops
3 Company Total	**218**	**93%**	
Warner Bros.	2	< 1%	Love Connection (cancelled next season)
All American	3	< 1%	Family Feud
Genesis	1	< 1%	Real Stories of the Highway Patrol
Off-Net Sitcoms	6	< 3%	Coach, Cheers, Roseanne, Golden Girls, (all grandfathered in West Palm Beach and Wilkes Barre); Married w/Children
PTAR Exemptions	4	< 2%	Rescue 911
Other-Total	**16**	**7%**	
Total-All	**234**	**100%**	

Source: NSI, Nov. 93. All Top 50 affiliates, M-F 700-800P (E.S.T.).

King World is by far the market giant, programming almost half of all affiliate access periods with just four programs. Paramount, the next leading rival, commands 28% of affiliate access periods with three programs, "Entertainment Tonight," "Hard Copy," and "Star Trek: The Next Generation." And Fox rounds out the triumvirate by controlling 16% of the top fifty affiliate access periods with only two programs, "A Current Affair" and "Cops."

There is no justification for a Commission policy that shifts tens of millions of dollars from one group of entities (network affiliates) to a small group of first-run syndicators that are at least as equally large, rich, and powerful.[29] Accordingly, the off-network restriction should be repealed.

3. The Off-Network Restriction Imperils The Viability Of Off-Network Syndication.

Similarly, there is no public policy basis for unduly narrowing the potential customer base of syndicators of off-network programming. This artificial reduction in the number of buyers lowers the price of off-network programming to independent stations, resulting in an unjustifiable subsidy from producers of network programming to such stations. This subsidy, combined with marketplace changes that have led to a drop in the number of stations airing off-network programming, threatens the viability of off-network syndication and, consequently, of network production.

a. The restriction hurts the market for off-network syndicated programming by artificially reducing the number of potential buyers.

The health of off-network syndication unquestionably affects network programming. ABC, CBS, NBC, and Fox acquire most of their entertainment programs from outside producers.[30] Traditionally, the license fee paid by networks to outside producers does not cover the full cost of producing a show. The disparity between network license fees and actual production costs is commonly referred to as a production "deficit." The size of such a deficit often represents as much as 30% of total costs. In addition to the deficit attributable to any series that

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[29] *See, e.g., National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 534 (2d Cir. 1975) ("While a purpose of PTAR [] was to encourage independent production for access time, it was not to improve the position of the producers against the networks. Nor was there any intention to make the networks poorer. What is prohibited is that these be the goals."); *Fin-syn Tentative Decision*, 94 F.C.C. 2d at 1094 (The FCC does not have "a proper role to play in allocating revenues or profits between the networks and those who supply programming for network use.").

[30] ABC, CBS, and NBC themselves will produce or co-produce 45% of their prime-time entertainment series appearing on their Fall 1994 network schedules; the rest has been ordered from outside suppliers. *WB Tops TV Prod'n Crop; Webs' in-house shift cuts into studio, indie pie*, Variety, May 25, 1994, at 1.

reaches the network schedule, producers must also bear the costs of development for all of their projects, failed pilots, overhead, and other expenses.

Accordingly, to cover their deficits and earn a profit, producers must further market their shows outside of the network\affiliate distribution system. The single most important marketing opportunity for this purpose is the sale of rerun rights to individual stations in the domestic syndication market.[31]

To avoid undue repetitions of a particular episode, an entertainment series must be produced for at least four seasons of network broadcast, or eighty-eight episodes, in order to accumulate a sufficient number of episodes to be commercially viable in off-network domestic syndication.[32] About six seasons worth of episodes, or 130, are needed to obtain the maximum price. Since relatively few series survive on a broadcast network for that length of time, most end up losing money.[33] Producers must therefore rely on a few series that are hits in syndication, such as "The Cosby Show" or "Roseanne," to cover losses and provide enough profit to warrant staying in the business of creating programming for network distribution. The most lucrative time period in syndication during which this programming can be shown is in "access," generally from 7 to 8 p.m., when substantially more viewers are tuned in to their sets.[34]

The off-network restriction severely imperils the ability of producers to recoup their investment by reducing the "shelf space" available for syndication — thereby depressing the prices

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[31] *See, e.g.*, *Evaluation of the Syndication and Financial Rules*, 6 FCC Rcd 3094, 3107 & n.30, *recon*, 7 FCC Rcd 345 (1991), *vacated sub nom. Schurz Communications Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

[32] This is because local stations commonly air episodes of a particular syndicated off-network program in the same time period on five or more consecutive days of the week, a practice known as "stripping."

[33] Fewer than one in ten programs accrue enough episodes to be profitable in syndication. With sitcom producers spending as much as $45 million to finance the deficit a program generates during its first four years, it can take ten years in syndication before a show is profitable. As Paul Kagan points out, "[n]etwork program suppliers rely on backend success to pay for program deficits, unsuccessful series (at $150 K per episode and up) and new development. Thus, suppliers need to periodically hit the jackpot in order to drive new production." Kagan, TV Program Stats, Oct. 21, 1992, at 1, 2.

[34] *See, e.g.*, Independent Stations 1990 Reply at 18; Remand Comments of the Association of Independent Television Stations, Inc., MM Docket 90-162, at 17-18 (filed Feb. 1, 1993) ("INTV Fin-syn Remand Comments").

that such programming may obtain. The prohibition forecloses syndicators from about 56% of their potential customers in the fifty largest television markets.[35] More important, in many cases, these forbidden outlets are the most well-established stations with the largest potential audiences, which can, therefore, offer the highest prices.[36] Other outlets, such as cable and satellite broadcasters, do not attract enough viewers and therefore simply cannot pay the prices syndicators must earn in order to cover their deficits.[37] Repeal of the off-network restriction would increase demand for off-network syndicated programming by allowing affiliates to purchase these shows for broadcast in access. This, in turn, would attract more producers, lead to higher-quality programming, and enhance viewer choice.

b. Recent marketplace developments such as the rise of a fourth network have further and dramatically reduced demand for off-network programming.

Recent developments in the marketplace have exacerbated the downward pressure on prices imposed by the off-network restriction. These changes have increased the difficulty faced by producers and syndicators of off-network material in finding a sufficient number of viable outlets able to afford the prices necessary to cover production deficits, even for those programs that do reach the syndication stage. Most notably, the number of such outlets has declined sharply

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[35] As a practical matter, the universe of potential buyers in the top fifty markets is composed of the 200 affiliates of the four operating networks, plus the sixty-nine viable independent stations now broadcasting there. "Viable" independents are those stations that are active purchasers of off-network programming which post audience ratings of "one" or better. This definition excludes predominantly religious, home shopping, or foreign-language stations.

[36] Nielsen Stations Index, Feb. 1994 (listing 150 ABC, CBS, and NBC affiliates out of 269 viable stations in top 50 markets). *See Ratings in the Top Markets for the February Sweeps*, Electronic Media, Mar. 14, 1994, at 6 (listing local ratings in the top markets showing dominance of affiliates); *compare* NAB, 1993 Television Financial Report 34-38 (average total net revenues of affiliates in top fifty markets in 1992 were $36,739,797) *with id.* at 65-67 (average total net revenues of independents in top forty markets in 1992 were $23,918,997); Investing In Television Market Report 1994 at 1-50 (showing VHF channel positions and higher ratings garnered by network affiliates).

[37] An "inexorable business cycle of television" subjects all commercial stations, regardless of size, to an "unbreakable cyclical relationship between the amount of advertising revenues, the amount of program spending, and the size of the viewing audience." William B. Lilley, III and Rudolph G. Penner, *Impact of Advertising on the Competitive Structure of the Media* (1990), *excerpted in* Reply Comments of CBS, Inc., MM Docket No. 90-162, exh. B at 1 (filed Aug. 1, 1990). Stations with smaller audiences earn less ad revenue and, accordingly, have less money to spend in support of high-quality, attractive programming. *See infra* at Section II.D.

since the early 1980s. While some of the decline is attributable to stations going out of business,[38] the single most significant cause is the rise of the fourth television network.

Many of the strongest formerly "independent" stations are now affiliated with the Fox television network. The appearance of Fox and other new networks, while a long-awaited development, has placed off-network syndicators in an ever-tightening vise. Fox's 143 affiliates nationwide include many that had been the top-rated independent outlet in their market.[39] Fox recently announced new affiliate commitments that will give the network 150 full time affiliates, with an additional thirty-four part-time affiliates.[40] Many of these new affiliates are powerful VHF stations; as a result, the number of Fox affiliates that are VHF stations has almost doubled.[41]

Fox now offers fifteen hours of original prime-time programming each week, as well as a weekday two-hour Fox children's programming block and the top-rated Saturday morning cartoon block.[42] Future programming plans include expanding the Fox children's programming, scheduling an hour of late-night programming, and broadcasting games of the National Football League.[43] The mathematical ramifications are clear: producers and syndicators of off-network

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[38] After the proliferation of independent stations during the early and mid-1980s, many declared bankruptcy or simply fell dark. *See, e.g., Indies Write Chapter 12*, Channels, Jan. 1990, at 58; Kagan, Broadcast Stats, Dec. 19, 1988, at 1.

[39] *See, e.g., Fox Network Begins to Take Shape*, Broadcasting, Aug. 4, 1986, at 44 (FBC's first seventy-nine affiliations included forty-four of the top fifty markets, thirteen VHF independents, and major station groups); *Life among the high rollers*, Broadcasting, May 13, 1985, at 36, 37-38 (Fox acquisition of WTTG, the top-ranked independent in the nation).

[40] *Fox Nabs 12 Affiliates from Rivals*, Washington Post, May 24, 1994, at A1, A10; *see also Fox will sign up 12 new stations; takes 8 from CBS*, New York Times, May 24, 1994, at A1, D6.

[41] *See infra* at notes 58-61 and accompanying text.

[42] *Out-Foxing Its Rivals*, USA Today, May 25, 1994, at 1-B; *Fox Kids Net Flush with Ad $* Daily Variety, Apr. 6, 1994, at 1; *Networks Rev Upfront with Sat. Kidvid Rollout*, Daily Variety, Apr. 4, 1994, at 6.

[43] *See A Homeric deal for "Simpsons"*", The San Francisco Examiner, Jan. 18, 1994, at C-9 (citing Fox plans to "get back into late night" and Fox NFL coverage); *Fox Unveils Kids' Lineup for Fall*, Chicago Sun-Times, Apr. 6, 1994, § 2, at 50.

Furthermore, as a result of its affiliation-investment deal with New World Communications Group, Fox has committed to air a two-hour daytime programming block from New World — a producer known for its soap operas — and possible late-night programming as well. *Syndicators in Fear of NW daytime block*, Variety, May 30 - June 5, 1994, at 21, 26 ("Once the time periods and license fee dollars start to dry up, the consensus is the playing field will shrink — forcing many small- and medium-sized sellers out of the business.").

programming have already lost the opportunity to sell programming to these formerly independent stations for almost 750 total weekly prime-time hours, or 40% of the otherwise available shelf-space in the top fifty markets.

To take but one example, in Portland, Oregon, the twenty-seventh largest market, KPDX (TV), the Fox affiliate, schedules only one quarter of the amount of off-network fare during the weekday access periods and prime time that it carried before the creation of the Fox network in 1984. KPDX no longer broadcasts any off-network programming during its access hour, and it uses only half the off-network programming during prime time that it did a decade ago.[44] Thus, hours once filled with off-network programming now are effectively off-limits to the syndicators of such programming.[45]

With the removal of KPDX and other Fox affiliates from the market for off-network programming, only the weaker non-network stations generally remain as customers.[46] Frequently, these stations lack the audience potential that is needed to make a meaningful contribution toward coverage of producers' financing deficits. The decrease in demand, combined with a growing supply of off-network programming from the Fox network, undermines the viability of off-network distribution — and ultimately eliminates the ability of producers to finance high-quality programs for network television.

The rise of the new Warner or Paramount network will further imperil the off-network syndication market.[47] When these networks' plans come to fruition, there will be even less shelf space, and even more product.[48]

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44 *Compare* TV Click, The Sunday Oregonian, Mar. 18, 1984 *with* The Oregonian, Mar. 1, 1994 (TV insert).

45 *See* Kagan, TV Program Stats, Aug. 31, 1993, at 1 ("audience for syndication has steadily declined over the past four seasons . . . primarily due to the expansion of Fox and increase of local news programming").

46 *See, e.g.*, Investing in Television Market Report at 1-50 (BIA 1994) (listing ratings and channel positions of network affiliates, Fox affiliates, and independents).

47 Warner, with twenty-four signed affiliates as of April 17th, plans to begin its network operations in January 1995 with at least two hours of prime-time programming. Its goal is to reach fifteen hours of prime-time shows and a full lineup of children's programming in the following five years. Paramount, with thirty-six stations signed and a national reach of 46%, also plans to launch its network in January 1995 with an 85% clearance level. Paramount will initially provide four hours of programming over two nights,

c. This alteration in the market has contributed to a "glut" in the supply of off-network shows.

Not only has the demand for off-network programming decreased, but the supply of such programs has increased dramatically — thus further depressing the syndication value of programming originally aired on ABC, CBS, and NBC. Fox itself now generates off-network hits, such as "Married . . . With Children" and "The Simpsons." Because these shows have enjoyed the substantial exposure that attends several years on a national network, they have become viable candidates for off-network syndication.

But Fox is not technically a network, according to the Commission's rules. The FCC defines a "television network," in relevant part, as "any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime-time programming per week . . . to interconnected affiliates that reach, in the aggregate, at least seventy five (75) percent of television households nationwide . . . ."[49] Fox has purposely avoided providing a schedule that would trigger this definition — because to do so would eliminate advantages that Fox and its affiliates currently enjoy under PTAR.

Regardless of Fox's legal status as a network, "off-Fox" programming is now competing for shelf space with off-network programming originally aired on ABC, CBS, and NBC.[50] To

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led by a new "Star Trek" spin-off. *WB Credo*: *If you can't sign 'em, create 'em*, Variety, Apr. 11-17, 1994, at 45, 46; *WB, Paramount Nets add affiliate stations*, Variety, Apr. 11-17, 1994, at 53; *Indies in Demand: Paramount, Warner Hunt For Affiliates*, TV Program Investor, Oct. 31, 1993, at 3.

48 In markets where they do not have primary affiliates, Fox, Paramount, and Warner have aggressively sought further clearances for their programming by placing shows in available time periods on stations that already are affiliated with ABC, CBS, NBC, or Fox. For example, Paramount is seeking to "get another network's affiliate in the market to run the Paramount shows . . . . in prime access or in the 11 p.m. timeslots ... [or] at 10 p.m., when Fox is not supplying network programming." *Warner vs. Paramount is top card in Miami Beach*, Broadcasting & Cable, Jan. 24, 1994, at 4; *WB weighs station plan*, Daily Variety, Apr. 11, 1994 at 3. *See also Fox Nabs 12 Affiliates from Rivals*, Washington Post, May 24, 1994, at A1 (Fox with thirty-four secondary affiliations). Clearly, this development will further deplete the shelf space available for off-network programming.

49 47 C.F.R. § 73.662(i) (1993).

50 *See, e.g.*, Kagan, TV Program Investor, June 30, 1993, at 2 (predicting "continuing weak demand for pedestrian off-network fare"); Paul Kagan, TV Program Investor, May 31, 1990, at 4 ("As long as product remains abundant — a likely scenario with Fox increasing the supply of off-network programming by 25% over four years and first-run syndication on the rise — the buyers market will stay in force.").

take one prominent example of this plethora of programming, syndicators of the long-running and extremely popular "Evening Shade" tried for eighteen months to sell this high-rated show in syndication. Failing to get sufficient clearances, they were finally forced to pull the program from the off-network syndication market and sell it to cable for less money.[51] Once it became apparent that the program could not make money in syndication, producing it was no longer economically viable — whatever its success in its network run —and it was canceled.

As might be expected, the diminishing demand and the increased supply have exerted a strong downward pressure on syndication prices. Thus, the average license fee in syndication for half hour off-network programming has fallen from $1.3 million per episode in 1989 to just over $675,000 for programming available in 1994.[52]

Producers simply will not continue to invest in high-quality network programming without a reasonable prospect of recouping their expenses and earning a profit. As Paul Kagan reported, "the continuing slump in domestic demand for off-network hours has made making and owning them a lot less attractive."[53] As outside producers require larger license fees to cover their production costs, networks are producing and airing lower-cost programming.[54] With less money

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[51] *'Evening Shade' skips syndication for cable*, Electronic Media, May 2, 1994, at 3, 50. Although it had cleared eighty-six markets with 57% coverage, the series did not obtain commitments in New York or Los Angeles. Major markets are where off-network series generate the bulk of their revenue. *Id.*

[52] *See, e.g.*, Kagan, TV Program Investor, Apr. 30, 1993, at 5 ("with the glut in syndication . . . [syndication] fees are slipping close to record lows"); Kagan, TV Program Investor, Nov. 30, 1992, at 5 (The vanguard of the long-anticipated glut of off network sitcoms is finally rolling into the marketplace. . . . . Per-episode [syndication] license fees are drifting south . . . .").

There are occasions when a show, such as "Seinfeld," is so popular that it can break out of the price patterns established overall for other successful off-network programs. But these instances are too rare for a producer to count on. The magnitude of a show's popularity is impossible to gauge when initial production work begins, and this phenomenon requires the interest of notable "deep-pocket" station owners, such as Tribune and Fox. *See Another Seven Stations For Seinfeld*, Broadcasting & Cable, May 9, 1994, at 20.

[53] Paul Kagan, TV Program Investor at 1, July 31, 1989. *See also* Kagan, TV Program Investor, June 30, 1993, at 2 ("the continuing rollout of the Fox TV network to seven nights and the likely creation of a fifth or even a sixth network means continuing weak demand for pedestrian off-network fare"); Kagan, TV Program Investor, Nov. 30, 1993 at 1 ("backend economics, with the exception of a handful of hits, have eroded from their Cosby/Who's The Boss/Roseanne glory years").

[54] Evidence of this trend can already be seen in the proliferation of lower priced programming that has appeared on network schedules in recent years, including news magazines and "reality based" programming such as "Rescue 911." *See, e.g.*, *Network News Divisions Go After More Primetime*,

spent on shows, program quality on the regulated broadcast networks will tend to decline. Inevitably, this cycle of declining quality will adversely affect viewers.

In sum, off-network syndicators are "squeezed" on both sides, selling to fewer customers who are faced with more and more choices. These customers are in the driver's seat, although they have been placed there by a misguided government policy. As discussed below, this problem would be significantly lessened by letting network affiliates carry off-network programming during the access period.

4. The Off-Network Restriction Puts Networks, Affiliates, and Producers of Network Programming At An Unjustified Competitive Disadvantage.

The off-network restriction not only creates inequities in the form of unwarranted subsidies, it also puts certain companies at an unjustified competitive disadvantage vis-a-vis the newest networks. Three years ago, at Fox's behest, the Commission exempted any "television network" from the limits imposed by the fin-syn rules or PTAR so long as that network capped its prime-time programming to fifteen hours per week.[55] Consequently, so-called "off-Fox" programming may be aired by affiliates of ABC, CBS, and NBC during the access period.

This exemption creates a classicly arbitrary and capricious outcome: virtually identical sitcoms are treated quite differently under the rule. For example, the rule favors a sitcom like "Married . . . With Children," produced by Sony/Columbia, while disfavoring a sitcom like "Designing Women", which *also* was produced by Sony/Columbia. The sole reason for this distinction is that the latter show aired on CBS, one of the three regulated networks.[56] This makes

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Electronic Media, May 23, 1994, at 4, 50 (CBS News plans to test a fourth news magazine, "America Tonight," anchored by Deborah Norville; NBC News is adding a second evening of "Dateline NBC" on Fridays).

[55] *See* Second Fin-syn R&O, 8 F.C.C. Rcd at 3331 n.132 (discussing 1991 exemption created by new definition of "television network" and further easing of exemption for purposes of fin-syn rules) and accompanying text; § 73.662(f) (1993). Fox has openly acknowledged that it restricts its prime-time network schedule so that it may continue to enjoy its exempt status. *See, e.g.,* Comments of Fox Broadcasting Company, MM Docket No. 90-162, at ii, 12 (filed Mar. 25, 1991).

[56] *See* The Hollywood Reporter, 1993-94 TV Preview 33-38.

no sense, especially given that the same producers pitch shows to all four networks, and that a producer may offer the exact same *series* to Fox or its older network rivals.

The exemption also leads to an irrational disparity in the prices off-Fox programming can command in syndication compared with the prices of other off-network programming. This unreasonable distinction injures both producers for, and affiliates of, ABC, CBS, and NBC. The exemption drives up the value of so-called "off-Fox" programming, such as "Married . . . With Children" or "The Simpsons," which may be aired during access by *all* stations, affiliates and independent stations alike.[57] The value of shows coming off of ABC, CBS, or NBC, which may be sold only to independent stations, is consequently reduced. Thus, even though the programs themselves (and their original prime-time ratings) are equivalent, the exemption helps producers whose programs first air on Fox and hurts producers whose shows air initially on the other networks. To illustrate:

- In 1991, Fox's "Married . . . With Children," a 20-share show, commanded $2.4 million per episode in syndication. That same year, "Full House," — an ABC show 8 share points higher — took in only $750,000 an episode.

- Just one year later, "Roseanne," also a 28-share show on ABC, netted $1.8 million per episode in syndication.

- In 1994, the "Simpsons," a 21-share show on Fox, garnered $1.2 million per episode in syndication. That same year, "Fresh Prince" — a 23 share show on NBC —brought in only $700,000.

The illogic of the FCC's policy has become more obvious recently given Fox's success at wooing a dozen affiliates away from the regulated networks in major markets like Detroit, Cleveland, and Atlanta.[58] The recent affiliation switches mean that, in a dozen markets, Fox has

[57] *What Price Comedy? Tracking Off-Net Trends*, Broadcasting, Nov. 16, 1992, at 30 (Twentieth to unveil marketing plan for "The Simpsons" that "target[s] highly lucrative 6-8 p.m. time periods on affiliates"); *Fin-syn: Prime Access Windfall?*, TV Program Investor, June 30, 1990, at 2 ("Because Fox is operating under a fin-syn waiver, Columbia can sell 'Married ... With Children' to major market affiliates for access runs at higher prices than it might have ordinarily received.").

[58] *See, e.g.*, *Fox Will Sign Up 12 New Stations; Takes 8 From CBS*, New York Times, May 24, 1994, at A1. Its affiliation agreement with New World Communications Group provides for Fox to invest $500 million in New World's stations, meaning Fox could end up with direct ownership interests in twenty stations nationwide. *Fox TV Deal Seems to Face Few Official Barriers*, N.Y. Times, May 25, 1994, at C-6. Fox already has made a practice of obtaining cable carriage in communities that lack a sufficient number

upgraded from a UHF station to a technologically superior VHF facility, boosting its VHF clearances to "40% of the country, which is expected to lead to increased ratings and ad revenue."[59] Assuming that CBS would then affiliate with the former Fox stations, twelve stations situated squarely in the UHF band will be barred from airing off-network programming during the access period — while a dozen powerful VHF stations will be unregulated. Such a perverse result was, without doubt, not intended at the time the rule was imposed.

Future affiliation changes promised by Fox officials presumably also will include other VHF stations. Fox Chairman Rupert Murdoch has declared that "you will see another six or eight VHF stations joining our line-up between now and Christmas," and he reportedly "has told his station executives that he wants VHF affiliates in all of the top thirty markets."[60] The promise of future upheaval in the marketplace, together with the changes that have already occurred, amply demonstrate that the off-network restriction no longer makes sense.[61] Only repeal of the restriction can level the playing field.

The unreasonable effects of the off-network restriction and its exemption reverberate further. Prohibiting the affiliates of ABC, CBS, and NBC from carrying off-network programming during the access period denies these stations the freedom to choose the programming that works best for their audiences — the same choice now enjoyed by Fox affiliates and independents, who may schedule first-run, off-network, off-Fox, or off-syndication fare during their access time slots. The financial harm is also obvious. The restriction precludes

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of stations to allow for traditional affiliation. *Fox Net Expands FBC Reach*, Electronic Media, Aug. 3, 1992, at 4.

59 *Fox Places New World Order*, Variety, May 24, 1994, at 1.

60 Martin Dickson & Raymond Snoddy, *Fox among the television giants*, Financial Times, June 6, 1994, at 23; John Lippman, *CBS On the Prowl to Replace 8 Stations Lost in Fox Raid*, L.A. Times, May 27, 1994, at D4.

61 Fox owner Rupert Murdoch said the affiliation switch by New World Communications "will change forever the competitive landscape of network television." Unnamed industry observers agreed: "This deal puts Fox right up there with the big boys . . . . The question is, who is the fourth network now, CBS or Fox?" *Fox Places New World Order*, Variety, May 24, 1994, at 1.

affiliates from airing off-network programming during the most lucrative time period available for it: prime time, when audiences and advertising revenues are higher than at any alternative period.

And finally, repeal of the restriction could positively affect prime-time programming distributed by ABC, CBS, and NBC.[62] Improvements in the syndication marketplace would make more resources available for the production of high-quality programming, thereby ultimately benefiting the viewing public.

II. ANY BENEFITS OF THE OFF-NETWORK RESTRICTION TO THE INDEPENDENT STATIONS DO NOT JUSTIFY ITS COST TO THE PUBLIC INTEREST.

Any lingering fear that the off-network restriction constitutes independent stations' sole support is misplaced. As demonstrated below, the independents that benefit the most from the restriction are those least in need of help. Those from whom the off-network restriction extracts a real burden — including network affiliates, programming suppliers and, ultimately, the audiences they serve — should not be forced to subsidize the interests of well-connected independent stations.

A. Most Independents Are Members of Large Station Groups.

Few true "mom and pop" independent stations are left in the industry, particularly in the top fifty markets. In the fifty largest markets, there are only sixty-nine viable independent stations which are not Fox affiliates. Only sixteen of these independents are neither owned by a broadcast group nor affiliated with the impending Paramount or Time Warner networks.[63] In addition, industry consolidation of one form or another has further reduced the demand for off-network programming. The trade press has noted that "[c]ombined with the transformation of

[62] *See supra* at Section I.B.3.

[63] *See* Nielsen Stations Index, Feb. 1994. The definition of a "viable" independent station appears at note 35, *supra*.

independents to Fox affiliates, the consolidation trend is making the truly *independent* independent a rare, if not endangered species."[64]

For example, many smaller stations, unable to compete against group-owned stations, have opted for specialized formats. By dedicating their schedules to material such as religious or home-shopping programs, they effectively eliminate themselves as outlets for off-network fare.[65]

In short, the remaining independents who may benefit from the subsidy created by the off-network restriction are generally large entities. They neither need nor deserve special favors.

B. The Off-Network Restriction Does Not Sustain The Viability Of "Marginal" Independent Stations.

Independent stations have long claimed that their very existence depends on the availability of a relatively small number of new off-network "hits."[66] But the non-network and independent stations that actually acquire the few wildly popular (and therefore more expensive) hits are not operations that struggle week by week to stay on the air. Truly "marginal" independent stations generally are unable to afford such shows. The lowest rated stations in the top fifty markets do not run recent off-network hits during the access period.[67]

Instead, the off-network restriction primarily benefits the non-network Fox affiliates or well-established independents owned by other major group owners such as Tribune, Paramount, and Chris-Craft. These well-connected stations are buying rights to the newest off-network hits

64 *Independents network for survival*, Broadcasting & Cable, Mar. 1, 1993, at 11 (emphasis added).

65 *Networks & Shopping: Independent TV's New Frontiers*, Broadcast Investor, Aug. 18, 1986, at 5 ("[Home Shopping Network's] move into UHF stations . . . will bail out a number of UHF owners who would have been unable to play the syndicated program auction game."); INTV Remand Comments at 15 ("increases in the number of local broadcast stations . . . has led to specialized format stations (*e.g.*, ethnic, foreign language, religious, home shopping)").

66 *See*, *e.g.*, INTV Fin-syn Remand Comments at 17; Comments of Independent Stations, MM Docket No. 90-162, at 5 (filed Feb. 1, 1993).

67 *See*, *e.g.*, WBNA, Channel 21 in Louisville, Kentucky, and the only non-Fox independent, runs infomercials during Prime Access. *See TV Week*, Louisville Courier-Journal, Mar. 6, 1994 (reporting television listings for March 6th through March 13th, 1994). Hal Protter, of Warner Brothers, defines marginal independents as those stations which "barely scrape by with hash-mark ratings because they're scheduling mixtures of home shopping, religious programming, and infomercials." *WB Weighs Station Plan*, Daily Variety, Apr. 11, 1994, at 3.

such as "Seinfeld" and "Home Improvement." As the general manager of a single-station independent in Los Angeles candidly explained, in the past his station

> could never compete in the half-hour arena because the other stations in the market were owned by groups. RKO owned one station, Metromedia another, and Chris-Craft had a group also. We were the only single independent. Thus, we couldn't get into a bidding war for sitcoms.[68]

In nineteen large markets where bidding for "Seinfeld" has occurred, all nineteen successful bids were made by powerful group–owned stations, such as Fox and Tribune.[69]

Furthermore, the FCC has never viewed the off-network restriction as a vehicle by which the government would protect marginal stations from competition.[70] The rule clearly was *not* crafted to shield marginal independents. Had that been the goal, PTAR would not exempt markets below the top fifty, where the poorest, most marginal stations exist.[71] The link between market size and marginality is indisputable. In markets 1-10, independent station median net revenue in 1992 was $23,790,269, almost four times higher than the figure for independent stations nationwide, at $6,738,529. But median net revenue drops sharply as the market size declines: in markets 41-60, it was $6,256,000; in markets 61-80, it was $4,478,437; and in the smallest markets, number 101 and above, it was only $2,083,555.[72]

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68 *To live and program in L.A.*, Broadcasting, Jan. 18, 1993, at 42 (quoting Greg Nathanson, general manager of KTLA). Nathanson further explained that, fortunately for the station, "we're a group now since Tribune bought us, and thus we have the buying power of a group." *Id.* Likewise, Jim Gabbert, president of San Francisco independent KOFY-TV noted, "As an owner of an individual station, I am at a tremendous disadvantage to buy programming. Chris Craft has lots of stations and can buy much of the best programming, leaving me with little choice." *Why Some Indies Are Taking the Fifth*, Broadcasting & Cable, Nov. 15, 1993, at 30, 32.

69 *See Nothing Captures America Like Seinfeld*, Electronic Media, May 23, 1994, at 12-13 (Advertising insert); *Another Seven Stations for Seinfeld*, Broadcasting & Cable, May 9, 1994, at 20. Similarly, "Home Improvement" was acquired by the Fox-owned stations in Los Angeles, New York, and Chicago. *Fox O&Os Take 'Home'*, Variety, May 24, 1993, at 31.

70 *See PTAR I*, 23 F.C.C. 2d at 395 (rule would benefit *affiliates* and also generally help stimulate UHF development); *PTAR III*, 50 F.C.C. 2d at 835 (by stimulating supply of first-run programming, PTAR would provide "a concomitant benefit to independent stations").

71 *Compare* Investing in Television Market Report 1994 at 51-207 *with id.* at 1-50 (reporting revenues and ratings of individual stations in 210 markets).

72 NAB, Television Financial Report 1993, at 64, 65, 68, 69, 71.